STATE OF MICHIGAN

COURT OF APPEALS

ROBERT W. GIBBONS,

Plaintiff-Appellant,

v

THOMPSON, O'NEIL & VANDERVEEN, P.C., JOHN R. VANDERVEEN, and GEORGE R. THOMPSON,

Defendants-Appellees.

UNPUBLISHED
March 27, 2007

No. 271628
Grand Traverse Circuit Court
LC No. 05-024735-NM

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals the trial court's order that granted summary disposition to defendants. For the reasons stated below, we affirm.

I. Facts

On November 5, 1999, Dr. Michael Hartzler performed surgery on plaintiff for a strangulated hernia. During the procedure, plaintiff's small bowel ruptured and filled his abdominal cavity with waste. A general surgeon, Dr. Lee Britton, took over plaintiff's post-operative care. Plaintiff became hypotensive and went into septic shock and later suffered a heart attack and stroke. On November 6, 1999, Dr. Britton performed additional surgery on plaintiff and found an inflammation of the sac lining plaintiff's abdominal cavity.

Plaintiff hired defendants to pursue any medical malpractice claims he had against Dr. Hartzler, Dr. Britton, and the Alpena General Hospital nursing staff. After they consulted with Dr. James McDonnell, a general surgeon, Dr. Russell VanHouzen, an internist, and a nurse, defendants decided to file a notice of intent only against Dr. Hartzler. Plaintiff's case against Dr. Hartzler went to trial and plaintiff received a judgment of more than $600,000 against Dr. Hartzler and his professional corporation, Alpena Surgical Associates, PLLC.

Thereafter, plaintiff filed this legal malpractice against defendants. According to plaintiff, defendants failed to sufficiently investigate his potential malpractice claims against Dr. Britton and the hospital nursing staff. Plaintiff also alleged that defendants failed to inform him of the limitation period and the fact that they had not filed a notice of intent against Dr. Britton and the nursing staff before the limitation period expired. Defendants moved for summary

disposition under MCR 2.116(C)(10) and argued, then as they do here, that their decision not to pursue claims against Dr. Britton and the nursing staff is protected by the attorney judgment rule and that they had informed plaintiff about the limitation period and about which parties they were suing. The trial court agreed with defendants and granted their motion for summary disposition.

II. Analysis

We review a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff argues that there is a question of fact about whether defendants exercised reasonable skill and judgment when they decided not to file a notice of intent against Dr. Britton or the hospital nursing staff. In *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002), we explained the attorney judgment rule:

> An attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. *Simko v Blake*, 448 Mich 648, 655-656; 532 NW2d 842 (1995). Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would under the same circumstances. *Id.* at 656. However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.* Further, "where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment." *Id.*

According to plaintiff, defendants should not have relied on opinions from experts who were not willing to testify at trial. This contention lacks support in law and logic. Our Supreme Court has recognized that, depending on the stage of litigation, plaintiffs will likely use different experts in the course of establishing their medical malpractice claim. See *Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004). When defendants relied on the opinions of Dr. McDonnell and Dr. VanHouzen, they were at the investigative stage of the case and needed to determine if, and against whom, plaintiff had medical malpractice claims. There is no requirement either in law or in logic that the experts used to determine if plaintiff has potential claims must be the same experts defendants call at trial. Thus, regardless whether the doctors would ultimately testify, because defendants trusted Dr. McDonnell and Dr. VanHouzen, two local physicians who had previously reviewed cases for defendants, they exercised reasonable care and judgment when they relied on their opinions.

Further, defendants did not conduct an unreasonable investigation merely because, pursuant to MCL 600.2169(1), Dr. VanHouzen was not qualified to testify about the appropriate standard of care for a general surgeon and neither Dr. VanHouzen nor Dr. McDonnell were

qualified to testify about the appropriate standard of care for the hospital nursing staff. A claim for medical malpractice consists of four elements: (1) the standard of care; (2) a breach of that standard of care; (3) an injury; and (4) proximate causation. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). Generally, expert testimony is necessary to establish the appropriate standard of care, the breach of that standard, and causation. *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986). The requirements of MCL 600.2169(1) do not apply to experts who testify to causation. *Woodard v Custer*, 476 Mich 545, 558 n 4; 719 NW2d 842 (2006). Both Dr. McDonnell and Dr. VanHouzen opined that, even if they breached the appropriate standard of care, neither Dr. Britton nor the nursing staff caused plaintiff's injuries. Accordingly, had defendants obtained expert opinions about standards of care, defendants nevertheless could not prove the element causation. Because the experts did not believe that Dr. Britton or the nursing staff caused plaintiff's injuries, defendants did not act unreasonably when they failed to obtain additional opinions from standard of care witnesses under MCL 600.2169(1).

Contrary to plaintiff's assertion, there is no factual dispute about whether Dr. McDonnell and Dr. VanHouzen sufficiently reviewed plaintiff's medical records. The record shows that both doctors testified that they reviewed a complete set of plaintiff's medical records before they provided their opinions to defendants. Indeed, both doctors also testified that they would not give an opinion about whether malpractice occurred without reviewing a complete set of the pertinent medical records. In an attempt to show that a factual question exists on this issue, plaintiff refers to four letters sent by defendants. However, the testimony about the letters established that there were no pertinent records that Dr. McDonnell and Dr. VanHouzen failed to review before they gave their opinions to defendants. Clearly, the trial court correctly ruled that defendants' decision about who to sue is protected by the attorney judgment rule.

Plaintiff also argues that defendants breached a duty to him when they failed to timely inform him and his family that they would not serve a notice of intent to Dr. Britton or the nursing staff. However, plaintiff testified that defendants told him when the limitation period would expire for his malpractice claims. Further, plaintiff testified that defendants told him that a notice of intent had to be filed against each person they intended to sue before the limitation period expired. And, plaintiff knew that, when the limitation period expired, a notice of intent had only been filed against Dr. Hartzler. Plaintiff cannot create a genuine issue of material fact by arguing that defendants had a duty to inform his family about the limitations period when his own testimony makes clear that he, the client, knew the limitation period and understood that all notices of intent had to be served within the limitation period.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder